

fore, find substance in the submission of the learned Advocate for the petitioners. Lastly, the learned Advocate for the petitioners has contended that even if it be accepted for the sake of argument that someone of the absentee co-sharers of the plaintiff petitioners was an enemy and his property vested in the Government under law, the petitioners being co-sharers in exclusive possession of the disputed property are entitled to retain possession thereof till partition of the share of the absentee owner. There is considerable force in this submission also.

25. For the foregoing reasons I am clearly of the opinion that the learned Additional District Judge has committed errors of law resulting in an error in the decision occasioning failure of justice.

In the result, the Rule is made absolute. The judgment and decree of the learned Additional District Judge are set aside and those of the learned Subordinate Judge are restored. There shall be no order as to costs.

Ed.

(DHAKA BENCH)

Special Original Jurisdiction.

Amin-Ur-Rahman Khan,
J. and B.B. Roy Chowdhury, J.

Judgment
March 22,
1987.

Sreemati Parul
Kusum Roy...
Petitioner.
Vs.
Bangladesh & ors.
...Respondents*

[This Rule is directed against the order of the respondent No. 3, namely the Upazila Nirbahi Officer, Anowara dated 14.9.85 declaring the disputed properties as vested property on the recommendation of the respondent No.

*Writ Petition No. 73 of 1986. In the matter of: An application under Article 102 (2) of the Constitution of the People's Republic of Bangladesh.

4, namely Upazila Revenue Officer, Anowara and approving grant of lease thereof in favour of the stranger respondent Nos, 6—9.] (1)

Constitution of Bangladesh, 1972

Article 102

High Court Division's power to issue writs.

The initiation of the V.P. case and the approval of the lease in favour of the stranger respondents 6 to 9 and the declaration of the property as vested property were all arbitrary, illegal, malafide and without any sanction of law. Upon the said facts and circumstances the petitioner made this application under Article 102 of Constitution. (3)

Defence of Pakistan Rules, 1965

Rule 169(4) defines "Enemy Property",

In view of the compromise decree Hrishikesh Roy had no subsisting right in the disputed property and as such the property could not be treated as "Enemy Property".

Hrishikesh Roy had no subsisting right in the disputed property since 2.11.62 in view of the compromise decree declaring the right of petitioner and Parul Bala Roy in the entire property in equal share and undisputedly they never went to India. So the respondent's claim that the property having belonged to Hrishikesh Roy and he having left for and remained in India during the war of 1965 and the property was thus an enemy property could not be sustained in law or was true in fact. (5)

Compromise decree was passed in 1962 and as such any person who had no kind of interest in the disputed property at that time had any scope to challenge the said compromise decree.

In support of his contention the learned Deputy Attorney General referred to a decision reported in A.I.R. 1947 (Lahore) 117 in which it has been held that a compromise decree can be challenged in law if it was obtained by fraud and collusion. (7)

The respondent Nos. 1-5 who are government officials and the respondent Nos. 6-9 who are strangers to the lands and who obtained the disputed lease from the government in 1985 had no kind of interest in the disputed properties in the year 1962 when the compromise decree was passed. So they had no scope to plead that their interest was affected by the said compromise decree so as to give them locus standi to challenge a compromise decree on the plea that it was obtained by fraud or collusion. (8)

Initially Hrishikesh had made a deed of declaration relinquishing his entire claim and share and subsequently in confirmation of the same made a compromise and as such it is apparent that no fraud was practised.

It is found that Hrishikesh had first of all made a deed of declaration relinquishing his entire claim and share in respect of the disputed properties in favour of the present petitioner and Parul Bala Roy and in confirmation of the same he later compromised the suit agreeing and consenting to the declaration of the title of the present petitioner and Parul Bala Roy in respect of the entire disputed property. Thus it is apparent that no fraud was practised upon Hrishikesh Roy who was said to be the owner of the property. (8)

Registration Act (16 of 1908) Section 17(2)(VI)

A compromise decree in respect of an immovable property creating transfer in respect of the subject-matter of the suit is exempted from registration.

In view of the exemption provided in section 17(2)(VI) of the Registration Act by which a decree or order of a court on a compromise in respect of immovable property, if such compromise decree creates transfer in respect of the subject-matter of the suit, that does not require registration. Thus the position is that the compromise decree holds good as there was no fraud by way of defeating the provi-

sion of section 17 of the Registration Act and the respondents have no legal scope or locus standi to challenge the said compromise decree which was passed in 1962 when the present respondents had no kind of interest in the subject-matter of the suit i.e. in the present disputed property. (9)

Defence of Pakistan Rules, 1965 Rule 182 (1) (b)

Hrishikesh Roy having no right or possession and the same having remained in the petitioner and Parul Bala Roy who never left for India the disputed property does not come within the scope of Enemy Property and a vested property.

In view of the said decree we cannot but hold that the disputed property did not bear any right or possession of Hrishikesh Roy since after the decree dated 1962 and the right and possession remained with the petitioner and Parul Bala Roy who admittedly never left for India and were citizens of the then East Pakistan and later of Bangladesh all through. In that position the disputed property according to law could not come within the category of enemy property and the listing of the said property as Enemy Property as also the declaration of the said property as vested property were illegal and without jurisdiction. (10)

S.C. Das with Subrata Chowdhury—For the Petitioner.

A. Y. Salehuzzaman, D.A.G.—For the Respondents 1—5.

Baset Majumder—For the Respondents 6—9

Judgment

Amin-ur-Rahman Khan, J: This Rule is directed against the order of the respondent No. 3, namely the Upazila Nirbahi Officer, Anowara dated 14.9.85 declaring the disputed properties as vested property on the re-

commendation of the respondent No. 4, namely Upazila Revenue Officer, Anowara and approving grant of lease thereof in favour of the stranger respondent nos. 6-9.

2. 8.23 acres of land as described in the schedule in para No. 2 of the petition belonged to Jogesh Chandra Roy. He died leaving one son Purnendu Bikash Roy, one widow of the predeceased son Sukendu Bikash Roy and a grand-son Hrishikesh Roy who was the son of his another predeceased son Amalendu Bikash Roy. Parul Kusum Roy, the present petitioner was the said widow of Sukendu Bikash Roy. Hrishikesh Roy having lost his father in childhood was brought up by his 2 paternal aunts namely Parul Bala Roy and petitioner Parul Kusum Roy. After attaining majority Hrishikesh Roy relinquished his right in favour of his said 2 aunts namely, Parul Bala Roy and the petitioner by a deed of declaration dated 5.5.62. Subsequently Parul Bala Roy and the petitioner brought O.C. Suit No. 11 of 1962 against Hrishikesh Roy which was decreed on compromise on 2.11.62 and by the said decree the 8 annas rights of Parul Bala Roy and 8 annas right of the present petitioner in the entire disputed properties was declared. Parul Bala Roy executed a will dated 10.11.69 bequeathing her right in favour of the present petitioner and a probate of the said will was obtained by the petitioner on 29.3.79 after Parul Bala died on 9.3.70 at Anowara Upzilla. Thus the petitioner got the entire right in the 8.23 acre of lands which she had been possessing all through by living in Bangladesh and erstwhile East Pakistan and by paying rents up to 1389 B.S. But after that her offer of rents for 1390 B.S. was not accepted on behalf of the government.

3. Thereupon the petitioner started Misc. Case No. 3 of 1984 on 5.8.84, before the Respondent No. 4 who called for a report from

the local Tahsilder. In the meantime V. P. Case No. 20 of 1985 was started on 20.4.85 on the basis of a report dated 20.1.85 of the V.P. Tahsilder. Respondent No. 2 called for a report on 10.1.85 in Misc Appeal no 15 of 1984-85 but respondent No. 4 with an ulterior motive and without making any report and also without complying with the stay order passed in the Misc. Appeal hurriedly started a V.P. Misc. Case and proceeded to complete the lease of the properties without giving petitioner any notice or opportunity of being heard. The initiation of the V.P. case and the approval of the lease in favour of the stranger respondents 6 to 9 and the declaration of the property as vested property were all arbitrary, illegal, mala fide and without any sanction of law. Upon the said facts and circumstances the petitioner made this application under Article 102 of the Constitution.

4. On behalf of the respondent Nos. 1-5 and on behalf of the respondents No. 6-9 who are the lessees it was submitted that the petitioner had no right in the disputed properties either by inheritance or otherwise. It was represented that Hrishikesh Roy being the son of Jogesh Chandra Roy's predeceased son Amalendu Bikash Roy he along inherited the entire property. The said Hrishikesh Roy left for India before 1962 and since then never returned to this country and consequently he remained in India during the war of 1965 and all through. So his property i.e. the disputed properties were correctly listed as enemy property and rightly declared as vested property. Thus the grant of lease in favour of respondent nos. 6-9 was validly made and possession taken over by them.

5. Mr. S. C. Das, the learned Advocate for the petitioner referred to the relevant documents annexed to the petition to show that Hrishikesh Roy had relinquished his right by a deed of declaration dated 5th May, 1962 vide Annexure

'D' and the compromise decree in Other Suit No. 11 of 1962 which was a suit brought by the present petitioner and Parul Baba Roy against Hrishikesh Roy which was decreed on compromise on 2.11.62 on the basis of the compromise petition vide Annexure B and F. By referring to these documents Mr. S.C Das submitted that Hrishikesh Roy had no subsisting right in the disputed property since 2.11.62 in view of the compromise decree declaring the right of petitioner and Parul Bala Roy in the entire property in equal share and undisputedly they never went to India. So the respondent's claim that the property having belonged to Hrishikesh Roy and he having left for and remained in India during the war of 1965 and the property was thus an enemy property could not be sustained in law or was true in fact.

6. In answer to that the learned Deputy Attorney General submitted that the said compromise decree having been obtained by fraud and collusion could not be legally recognised and that the right of Hrishikesh Roy subsisted and as such it was rightly and lawfully listed as enemy property and was consequently declared as a vested property. So the lease granted by the respondent No. 4 in favour of respondents 6 to 9 was legal and proper.

7. In support of his contention the learned Deputy Attorney General referred to a decision reported in A.I.R. 1947(Lahore) 117 in which it has been held that a compromise decree can be challenged in law if it was obtained by fraud and collusion.

8. We have perused the decision and we find that the principle enunciated in the said decision cannot be applied to the facts of the present case which is quite different. In the referred case some co-sharers having interest in the property challenged a compromise decree obtained by 2 other co-sharers to defeat their interest and in that circumstances it was held

that such a compromise decree which was obtained by fraud and collusion could be disputed by the other co-sharers who had interest in the said property. But in our present case respondent Nos. 1-5 who are government officials and the respondent Nos. 6-9 who are strangers to the lands and who obtained the disputed lease from the government in 1985 had no kind of interest in the disputed properties in the year 1962 when the compromise decree was passed. So they had no scope to plead that their interest was affected by the said compromise decree so as to give them *locus standi* to challenge a compromise decree on the plea that it was obtained by fraud or collusion. In the counter affidavit of the respondent Nos. 1 and 2 all that was noted vide paragraph 6 of the affidavit was that the compromise decree that was obtained in 1962 by the petitioner and her sister in law Parul Bala Roy was illegal and void because of the fact that the same was obtained by practising fraud upon the court. But nowhere it was stated what was the manner in which the fraud was practised and also who practised fraud upon whom. Similarly it was nowhere stated in the counter affidavit that the petitioner had practised fraud on Hrishikesh. On the contrary it is found that Hrishikesh had first of all made a deed of declaration relinquishing his entire claim and share in respect of the disputed properties in favour of the present petitioner and Parul Bala Roy and in confirmation of the same he later compromised the suit agreeing and consenting to the declaration of the title of the present petitioner and Parul Bala Roy in respect of the entire disputed property. Thus it is apparent that no fraud was practised upon Hrishikesh Roy who was said to be the owner of the property.

9. Realising the position, the learned Deputy Attorney General submitted a clarification that fraud was practised upon the court inas-

much as a transfer of right in favour of the petitioner and Parul Bala Roy was sought to be created by the compromise decree by avoiding registration of a transfer deed as required by section 17 of the Registration Act. This contention of the learned Deputy Attorney General does not hold good in view of the exemption provided in section 17(2)(VI) of the Registration Act by which a decree or order of a court on a compromise in respect of immovable property, if such compromise decree creates transfer in respect of the subject-matter of the suit, that does not require registration. Thus the position is that the compromise decree holds good as there was no fraud by way of defeating the provision of section 17 of the Registration Act and the respondents have no legal scope or locus standi to challenge the said compromise decree which was passed in 1962 when the present respondents had no kind of interest in the subject-matter of the suit i.e. in present disputed property,

10. In view of the said decree we cannot but hold that the disputed property did not bear any right or possession of Hrishikesh Roy since after the decree dated 1962 and the right and possession remained with the petitioner and Parul Bala Roy who admittedly never left for India and were citizens of the then East Pakistan and later of Bangladesh all through. In that position the disputed property according to law could not come within the category of enemy property and the listing of the said property as enemy property as also the declaration of the said property as vested property were illegal and without jurisdiction. Consequently the impugned orders by which the said properties were proposed to be leased out to the respondent Nos. 6-9 and by which the said proposal were approved were also equally without jurisdiction. In other words the impugned orders had no lawful authority or legal sanction.

This rule is accordingly made absolute. The impugned orders are declared to have been passed without any lawful authority and to be no legal effect.

B. B. Roy Chowdhury, J.—I agree.
Ed.

(SYLHET BENCH)

Criminal Appellate Jurisdiction.

Qazi Shafiuddin, J. Judgment July 1, 1987.	Shamsul Haque Chowdhury.....Petitioner. Vs The State...Respondent*
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[The prosecution case in short is that the appellant Shamsul Haque Chowdhury while he was serving as a postal peon at Shingera Extra Departmental Post Office was entrusted with Taka 600/- being the value of Foreign Money Order No. 418 dated 9-3-78 to be delivered to payee Mrs. Asia Khatun, wife of one Abdul Mannan of village Bhatipara, P.S. Bishawanath, Dist. Sylhet, Instead of making the payment to the payee, the accused had criminally misappropriated the same by forging the signature of Asia Khatun dishonestly in collusion with one Abdul Manaf, brother-in-law of Mrs. Asia Khatun. The husband of the payee on getting information that his wife did not receive the money filed a petition of complaint to the postal department.] (2)

Penal Code (XLV of 1860)

Section 409

3 ingredients to be proved in order to convict.

Held : Second and third ingredients not proved.

In order to convict an accused under section 409 of the Penal Code, it is essential that

*Criminal Appeal No. 283 of 1980 (arising out of the Special Case No. 7/80 in the court of Special Judge Chittagong Division at Sylhet.